

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 NEPAMUCENO GALVAN,

4 Plaintiff,

5 v.

23 CV 6724 (CS) (VR)

6 STATUS CONFERENCE
7 ROLLING LAWNS, INC., DAVID FERRARO
AND EVAN FERRARO,

8 Defendants.

9 -----x
10 United States Courthouse
11 White Plains, New York
12 August 14, 2024

13 Before: THE HONORABLE VICTORIA REZNIK,
14 United States Magistrate Judge

15 KALMANSON COHEN, PLLC
16 Attorneys for Plaintiff
17 One Liberty Plaza, 165 Broadway
18 New York, New York 10006
19 KIMBERLY KALMANSON
20 RANDI COHEN
21 JONI KLETTER

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STEVEN MOSER

** Transcribed from digitally recorded proceedings **

1 THE COURT: Good morning, everyone. This is the
2 Galvan case.

3 Will counsel introduce themselves, starting with the
4 plaintiff.

5 MS. KALMANSON: Good morning, your Honor.

6 Kim Kalmanson, Randi Cohen, and Joni Kletter, from
7 Kalmanson Cohen for the plaintiff.

88 MR. MOSER: And Steven Moser for the defendants.

16 MS. KALMANSON: Yes, your Honor. This is Kim
17 Kalmanson.

18 So this is a case of age and disability
19 discrimination. We allege that the plaintiff, Nepamuceno
20 Galvan, worked for a landscaping company for approximately 30
21 years. Throughout that period of time he was promoted, and
22 then subsequently, when the owner's son came in, he was demoted
23 back to the basic role that he had been doing prior, and at
24 that time there was a failure to pay overtime, which we allege
25 in the complaint, for a period of, I forget if it was three

1 years or more. And he, at that time, we allege, began to be
2 discriminated against on the basis of his age. There are
3 several comments that we reference in the complaint that were
4 made to him and ultimately he was terminated on account of his
5 age and disability.

6 He, in a conversation, this is all alleged in the
7 complaint again, in a conversation with the owner, the owner
8 basically told him there's nothing wrong with his performance
9 but they need new, younger blood in the company and he was
10 terminated. So we allege that his termination was unlawful on
11 the basis of age discrimination.

12 There's also a disability claim. We allege that he
13 was injured at work. He injured his ankle and he was informed
14 by his employer that he shouldn't seek workers' compensation.
15 He was asked to return to work before he was ready to return to
16 work. There was no accommodation process granted to him and
17 his termination followed that as well. In terms of
18 discovery --

19 THE COURT: Okay.

20 MS. KALMANSON: In terms of discovery, we served --
21 both sides served document requests and interrogatories. The
22 parties produced sets of documents and interrogatory responses
23 in early July. Plaintiff was immediately met with two
24 deficiency notices from defendants. Several days later we
25 responded to those deficiency notices. We did acknowledge that

1 we made an error in our interrogatories. We were under the
2 misinterpretation -- misimpression that Rule 33.3 applied. It
3 did not. So we supplemented and corrected the interrogatories
4 on that basis within days.

5 We served an additional HIPAA form as well at that
6 time.

7 We have served certain third-party subpoenas, of
8 which the Court is aware and made reference to.

9 There was then a motion to stay service of the
10 subpoenas by defendants and the motions to compel followed.

11 We have tried to meet and confer with defendants. We
12 also served defendants with our own deficiency notice.
13 Defendants have not produced any ESI. We're not sure if they
14 have done any searches for ESI. Our client is aware that the
15 parties -- that the individuals on defendants' side texted
16 regularly and so we believe that there should be ESI. We have
17 asked counsel for defendants to get more information about
18 that. We have been trying to work in good faith to resolve the
19 issues. Defendants' counsel promised information on that a
20 couple of times. No information has been forthcoming to date.

21 It's our hope that we can continue to work amicably
22 to resolve disputes, but we keep being pouned with new motions
23 and deficiency notices, and we're not really getting any help
24 from the other side in terms of information about their own
25 discovery.

1 THE COURT: Okay. Can you remind me, at the moment,
2 what is your contact discovery deadline?

3 MS. KALMANSON: I believe it's in October.

4 Joni, do you know the discovery deadline?

5 MS. KLETTER: Yeah, it's the end of October.

6 THE COURT: Okay. And are you in a position to take
7 any depositions yet or are you still just working through these
8 document issues?

9 MS. KALMANSON: So defendants have noticed
10 plaintiff's deposition for Friday. We have noticed defendants'
11 deposition for early September and the nonparty depositions for
12 the next couple of weeks. It's our -- it's our intent, and
13 we've expressed this to defendants' counsel, that we push off
14 all depositions, because we're waiting for discovery from
15 defendants. We don't know the status of that yet and there are
16 two motions to compel our documents pending. So we'd like to
17 complete document discovery so witnesses don't have to be
18 produced more than once.

19 THE COURT: Okay. And how many depositions do you
20 think are likely in this case? Have you thought through that
21 yet?

22 MS. KALMANSON: So we have noticed two of defendants.
23 It was two, right, Joni?

24 MS. KLETTER: Correct.

25 MS. KALMANSON: We've noticed two plaintiffs --

1 defendants have noticed one deposition and we have subpoenaed,
2 it was six, one is deceased and one has not actually been
3 served, so four nonparties. We sought documents and
4 depositions and we are hopeful that we can waive some of the
5 depositions if there are documents but we just don't know that
6 at this point yet.

7 THE COURT: Those four nonparties are separate from
8 the ones that are the subject of the motion to quash?

9 MS. KALMANSON: No. Those are the same.

10 THE COURT: Okay. So those four nonparty -- those
11 subpoenas have already been served; is that what you're saying?

12 MS. KALMANSON: They have already been served but we
13 are -- we intend to adjourn the depositions. We have not done
14 it yet. We intend to adjourn the depositions until a mutually
15 agreeable date for the parties and counsel for the defendants,
16 and it is our preference to do all document discovery before we
17 take any depositions.

18 THE COURT: Okay. Those nonparties that you're
19 awaiting documents and potential depositions for are the
20 customers of the defendant; is that right?

21 MS. KALMANSON: That's right, your Honor.

22 THE COURT: Okay. And so are there any other
23 witnesses like (indiscernible) former employees of the
24 defendant who are on the list of deponents or is that not on
25 the list?

1 MS. KALMANSON: At this point we haven't noticed
2 anyone else. We don't have a full set of documents, so we are
3 trying to decide if there are other witnesses that we would
4 need to depose, but we can't really make that determination
5 without a full record.

6 THE COURT: Okay. When you gave me the deadline for
7 document discovery, that was the end of October; is that right?

8 MS. KALMANSON: I believe that's right, your Honor.

9 MS. KLETTER: Yeah.

10 THE COURT: Okay. And then you have a separate
11 deadline that Judge Seibel entered for expert discovery; is
12 that right?

13 MS. KLETTER: I think that's right. I can pull up
14 case management order.

15 THE COURT: All right.

16 So then let me turn to Mr. Moser (indiscernible) will
17 disagree with the underlying facts, but do you have an update
18 from your perspective on discovery and what else is necessary
19 (indiscernible) the disputes that we're talking about?

20 MR. MOSER: Sure. Thank you, your Honor.

21 So just briefly, this is a family-owned business.
22 The complaint alleges millions of dollars worth of damages and
23 the plaintiff is seeking \$700,000 in overtime and liquidated
24 damages, as well as other damages, which bring the total to
25 close to \$2 million.

1 We do not believe that the plaintiff has responded to
2 the interrogatories or the document requests in a manner that's
3 consistent with the federal rules. We've ask them to withdraw
4 improper objections, to withdraw the privilege objections, and
5 we did that approximately a month and a half ago, or a month
6 and a week ago, and plaintiff has simply declined to do that.

7 We asked for certain authorizations. We asked for
8 tax returns and other information which were also declined.

9 With regard to the scope of witness discovery, the
10 plaintiffs identified -- the plaintiff identified five current
11 and former employees of Rolling Lawns. We intend on deposing
12 at least the former employees and perhaps the current
13 employees, as well, although we haven't made the decision as to
14 that.

15 And otherwise, with regard to party discovery and
16 party depositions, we're okay with adjourning the depositions
17 until -- until we can close the page on paper discovery, as
18 well as adjourning the nonparty depositions in an attempt to
19 see if they can be resolved by document production or to hold
20 off until we have a more full paper discovery.

21 THE COURT: Okay. Well, so at least you all agree on
22 something. It's a start. Okay.

23 So why don't we start by ticking through some of the
24 discovery disputes that you all raised. I'm going to start
25 with the ones that were raised by Mr. Moser and see if we can

1 resolve some of it.

2 The first request -- well, so, I understand,
3 Mr. Moser, your initial problem with the objection that the
4 plaintiff has raised and made arguments about why these are
5 boilerplate and the like. I guess my perspective is, if those
6 boilerplate objections are not otherwise keeping the plaintiff
7 from producing responsive documents, in other words, they may
8 have some boilerplate objections in there, but at the end of
9 the day, if they produce the documents and don't have
10 objections to producing them, then I don't think it's something
11 worth arguing about or complaining about at this point.

12 So what I'd like to do is just focus on the substance
13 of what you need and what you want, what you're asking for, and
14 whether plaintiffs have any legitimate objections to producing
15 those specific documents.

16 So I think that based on the letters, your letter
17 that the issues that are -- that plaintiff -- well, let me
18 start there.

19 Are there any objections that plaintiff have made, to
20 boilerplate objections or otherwise, that they had made that
21 then result in not producing documents other than the issues
22 you identified in your letter? So those issues being tax
23 returns, cellphone records, the unemployment insurance file,
24 medical records regarding (indiscernible), workers' comp file,
25 retainer agreements, and travel records. At least that's the

1 list that I compiled based on your letters. Is there anything
2 else?

3 MS. KALMANSON: Your Honor, just one point on that.
4 We did provide the unemployment authorizations.

5 THE COURT: Yes. I did see that in your letter.
6 Yeah, I did see that. So that possibly is resolved.

7 But let me ask Mr. Moser. Is there anything else?

8 MR. MOSER: Well, from our perspective, we don't
9 know. We have made --

10 THE COURT: Okay.

11 MR. MOSER: And the reason why we don't know is
12 because the plaintiff has not stated whether or not he's
13 withholding documents pursuant to the boilerplate objections.

14 I agree with the Court, if the defendant had asserted
15 all these boilerplate objections and then clearly stated he's
16 not withholding any documents, then we would have -- I think
17 that would resolve the boilerplate issue. But the issue that
18 we have is we have a whole bunch of objections, privilege, et
19 cetera, and there's no statement as to whether he's withholding
20 responsive documents.

21 THE COURT: Okay. And that's, you're saying,
22 separate and apart from the issues I just ticked off --

23 MR. MOSER: Yeah.

24 THE COURT: -- from the categories of documents?

25 MR. MOSER: Correct.

1 THE COURT: Okay. (Indiscernible).

2 MR. MOSER: And that's (indiscernible) every single
3 document request he does not clearly state when asserting
4 objections whether or not any documents are withheld as
5 required by Rule 34 as of 2015.

6 THE COURT: Okay. So when I was looking through the
7 attached responses at least, if any of them (indiscernible)
8 objections and then subject to with reservation produced
9 nonresponsive -- will produce responsive, nonprivileged
10 documents or something to that effect, you're saying that even
11 with that language you're not certain whether there were
12 certain documents withheld based on the boilerplate objections.

13 MR. MOSER: Yeah, absolutely not. And it's not just
14 boilerplate objections. They're saying that they're producing
15 only nonprivileged documents which leaves us guessing as to
16 whether privileged documents have been withheld.

17 We're just -- again, we're just asking that the
18 plaintiffs be clear. If he's relying on these objections, it
19 would suggest that the purpose of the objections is to withhold
20 information, otherwise why object.

21 MS. KALMANSON: Your Honor, if I may.

22 THE COURT: Yeah, go ahead, Ms. Kalmanson. Perhaps
23 you can clarify --

24 MS. KALMANSON: Sure. So --

25 THE COURT: Based on the (indiscernible) letter it

1 seems like you were saying that, yes, we have these objections
2 but we still nevertheless produced documents.

3 MS. KALMANSON: That's correct, your Honor. And on a
4 meet and confer with Mr. Moser, we in fact told him we have not
5 withheld any documents on the basis of the boilerplate
6 objections. We provided specific objections, most often with
7 case law, in the many letters that have gone back and forth.
8 With regard to the categories of documents that we have
9 withheld and those are the categories of documents that you
10 have identified, your Honor, the tax returns, the cellphone
11 authorizations, travel authorizations, and retainer agreements
12 with counsel, we believe they're beyond the scope. We
13 legitimately believe they're beyond the scope.

14 I don't actually believe that there were any
15 privileged documents that were withheld. If there were, we
16 will certainly produce a privilege log, and I'm writing that
17 down to do, but I don't believe that there were any. But that
18 is our obligation, of course.

19 THE COURT: Okay. Right. Okay. So why don't I say
20 this. I mean, I think that -- it's hard for me to say on this
21 phone call which of those interrogatory responses or
22 (indiscernible) fall into the category Mr. Moser is referring
23 to. You made objections and he's not certain whether or not
24 you withheld any documents based on those objections, aside
25 from the categories that we're here to talk about today.

1 The one clarifying thing maybe for you to send a
2 letter to Mr. Moser that makes clear RFP by RFP saying,
3 notwithstanding these objections, we have produced responsive
4 documents, so that he knows which, if any, of the requests that
5 he made are still potentially at issue where he might have
6 issues with them. It sounds like you covered that, right? I
7 just want you to send a clarifying letter that confirms that
8 for him.

9 And, then, also confirm whether or not there are any
10 documents being withheld on the basis of privilege. And if so,
11 release the privilege log, or at least in the first instance
12 let him know by letter if there were documents withheld on the
13 basis of privilege and then propose a timeline for when you'll
14 produce the privilege log.

15 MS. KALMANSON: I can certainly do that, your Honor,
16 but I am looking -- and we have already done that. On
17 July 12th we sent a letter to Mr. Moser where we said about the
18 objections, there are only four document requests out of 32
19 where plaintiff has refused to provide any documents, and in
20 those instances, plaintiff specifically stated the reason for
21 the objection was specificity and in some instances even
22 provided case law supporting our position.

23 THE COURT: Okay, and so you identified which of
24 those four request --

25 MS. KALMANSON: I'm not going to do it again.

1 THE COURT: I guess, Mr. Moser, why was that not
 2 sufficient if plaintiff already did that?

3 MR. MOSER: Because they have not stated, although
 4 they state they have produced some responsive documents,
 5 Federal Rule of Civil Procedure 34 explicitly requires them to
 6 state whether or not they are withholding any documents
 7 pursuant to objection. If they are willing to just send me a
 8 letter that says, hey, pursuant to Federal Rule of Civil
 9 Procedure 34 we are not withholding any responsive documents
 10 pursuant to our objections, I have no problem with that.

11 MS. KALMANSON: Your Honor, my point is I'm happy to
 12 do it if the Court wants us to do it, but we've already done it
 13 and then we went into the specifics -- there are five -- no,
 14 four requests that we withheld documents on in the same letter,
 15 and we went through them and explained the reasons for the
 16 objections.

17 I just feel like this is a lot of -- a lot of back
 18 and forth to attempt to make us look bad when we've already
 19 done this. We're in compliance with our obligations.

20 THE COURT: All right. Well, I'm not -- let's put
 21 aside looking bad or anything. I don't think in those terms.
 22 I just want -- I think more pragmatically in how to resolve
 23 this so that you guys can move forward.

24 So I get that you think you've already done it, and
 25 I've looked at the letters, it does look to me like you said

1 what you needed to say, but in the hopes of resolving this
2 issue and putting it to rest, why don't you reconfirm, if you
3 want to think of it that way, what you've already stated. But
4 it sounds like this will give Mr. Moser assurance that you're
5 not withholding any documents on the basis of your objections
6 and just be clear about request this or that we have objections
7 but we haven't withheld any responsive documents based on those
8 objections.

9 You can identify any that still remain. There may
10 not be after we have this conversation about the outstanding
11 objections. I think the other objection for which you had
12 withheld documents are the ones we're about to talk about.

13 Am I right about that, Ms. Kalmanson?

14 MS. KALMANSON: Yes, your Honor, and we will do that.

15 THE COURT: Okay. Okay. So I'm not making a ruling
16 that you failed in doing what you were supposed to do.
17 Whatever you (indiscernible) I'd just like you to do it and
18 send that to Mr. Moser and at the same time confirm whether
19 you've withheld any documents on the basis of privilege and
20 provide a timeline for when you would produce a privilege log,
21 if you have withheld any documents on the basis of privilege
22 that you would need to do and haven't done yet; is that right?

23 MS. KALMANSON: I don't -- to the extent that one is
24 necessary, yes, we will do it. I don't know that we actually
25 withheld anything on the basis of privilege, but we will double

1 check and produce a log if necessary.

2 THE COURT: Perfect.

3 So tax returns. So explain to me, Mr. Moser, why do
4 you need the tax returns? What do you hope to gain from them?
5 Is there any other document or set of documents that could
6 provide you some more information?

7 MR. MOSER: Yes. Thank you.

8 So Mr. Galvan is running his own landscaping
9 business. And he has stated that he earned only \$4,500 from
10 running his own landscaping business. He also claimed that he
11 earns \$100 a day for working for another company, but he's
12 basically asking the defendants to take him at his word with
13 regard to his income.

14 I know that there is a need in this case for the tax
15 returns. In many cases where you have a plaintiff, for
16 example, who gets a stable job and has a W-2 at the end of the
17 year that shows that they earned, I don't know, \$50,000 or
18 \$80,000, the calculations can be done in a very straightforward
19 way. And in those types of cases, tax returns are not
20 necessary.

21 But when he's running his own business and he's not
22 even answering interrogatories with regard to the extent or
23 nature of his income, he's asking basically for the
24 plaintiffs -- the defendants and the trier of fact to take him
25 at his word that he's only earned, it looks like less than

1 \$10,000. And for that reason we think that it's appropriate to
2 obtain the tax returns in this case and I don't think he'll be
3 prejudiced by that.

4 Again, if he was not asserting a discrimination claim
5 or claim for future lost earnings, of course this would be a
6 nonissue in a FLSA case, but he's obviously raised this issue
7 and we need the tax returns.

8 THE COURT: Okay. So Ms. Kalmanson, is it true that
9 your claims include future lost earning?

10 MS. KALMANSON: Yes. We're seeking -- we're seeking
11 economic damages here. But we provided the information that we
12 were required to provide and tax returns are under a heightened
13 standard. That's just not necessary here.

14 We included in our, in our interrogatories the
15 compensation that plaintiff received. We included -- we
16 included unemployment insurance files. We included, I believe,
17 invoices. And Mr. Moser has an opportunity to depose our
18 client. He doesn't need the tax returns.

19 THE COURT: But this is about --

20 MS. KALMANSON: He doesn't meet the heightened
21 standard.

22 THE COURT: So tell me about -- the issue, I guess,
23 is that since leaving the defendants' employment, he started
24 his own business; is that the issue? And so then -- or was
25 this -- is that what we're talking about or was this business

1 being run while (indiscernible) being employed by defendant?

2 MR. MOSER: I'm sorry, your Honor. Were you
3 addressing me with that question?

4 THE COURT: No, I'm asking Ms. Kalmanson.

5 MS. KALMANSON: Oh, I'm sorry.

6 THE COURT: Explain to me -- from what I understand
7 from Mr. Moser, the issue is that the plaintiff is running his
8 own business and he said how much he's made, the amounts, and
9 that to the extent future lost earnings are going to be
10 calculated, it's based on comparing those -- if I understand
11 the law correctly -- it's based on looking at what he's
12 currently making versus what he claims he would have made if he
13 hadn't been terminated inappropriately; is that your
14 understanding?

15 MS. KALMANSON: I'm not --

16 MS. COHEN: Your Honor, this is Randi Cohen. In
17 every single employment discrimination case the terminated
18 employee has an obligation to mitigate his damages and seek new
19 work. And yes, Mr. Moser is correct, it is simple if somebody
20 has a W-2 job or an offer letter and things that are black and
21 white.

22 We dispute the contention that Mr. Galvan has started
23 a competing business, that he was doing anything competitive
24 while he was working, and in any event, there is no noncompete
25 here, so that's just a threatening line that is of no moment

1 here.

2 With respect to what he has earned following his
 3 termination, we have provided all of the information that we
 4 are required to provide and Mr. Moser is free to depose
 5 Mr. Galvan on the subject. To the extent that following his
 6 deposition there are additional documents that it is
 7 appropriate to call for, he is free to do that. But at this
 8 juncture there is no basis to impede on his privacy with the
 9 discovery of tax returns, (indiscernible) only on security
 10 records.

11 THE COURT: (indiscernible). Okay. We're not
 12 talking about that yet, we're just talking about tax returns at
 13 the moment.

14 So tax returns, I want to understand, is the dispute
 15 right now that he, after he (indiscernible) working on his own
 16 business and so that -- the records relating to that haven't
 17 been produced? I'm just trying to understand -- or has he been --

18 MS. KLETTER: Yeah, Mr. Moser is making an
 19 assumption, because we provided him with a document where
 20 Mr. Galvan invoiced a company where he did two weeks of work,
 21 and he said it was Galvan Landscaping. He doesn't have a
 22 business. So it's --

23 THE COURT: From your perspective --

24 MS. KLETTER: -- two weeks of work that he did.

25 THE COURT: Okay. So since he's been terminated, is

1 it your contention that he's been unemployed or has been
2 employed by some other company? What's your contention in this
3 case?

4 MS. KLETTER: Yeah, so --

5 MS. KALMANSON: He has done odd jobs -- go ahead,
6 Joni.

7 MS. KLETTER: Yeah. He's earning \$200 per week
8 working for a landscaping company, which we had informed
9 Mr. Moser. He also mows his daughter's lawn and gets about
10 \$150 a month.

11 THE COURT: I see. And so --

12 MS. KALMANSON: And at some point he received
13 unemployment which we put the amounts in as well as the
14 documentation supporting and his authorization.

15 (AT&T AUDIO MESSAGE: Judge Resnick's chambers, has
16 left the conference)

17 THE COURT: Are you still there, everyone?

18 MR. MOSER: Yes.

19 MS. KALMANSON: Yes.

20 THE COURT: Okay. Just making sure.

21 And when was Mr. Galvan terminated?

22 MS. KALMANSON: March of 2023. Right?

23 THE COURT: Okay. And so what has been produced in
24 terms of this issue of mitigation of damages or the amount he's
25 been making since he was terminated? What have you produced up

1 till now? You keep repeating that you produced everything you
2 were supposed to produce, so can you describe for me what it is
3 you produced so far?

4 MS. KALMANSON: Yes. In the interrogatory responses
5 we listed out the amounts of money that he has received since
6 his termination. We've produced his unemployment insurance
7 documentation and we have produced --

8 What were these, invoices, Joni?

9 MS. KLETTER: The invoice from the painting company
10 that he did a little bit of work for but this is -- yeah --

11 THE COURT: Go ahead.

12 (AT&T AUDIO MESSAGE; Judge Reznik's chambers has
13 joined the conference)

14 THE COURT: Okay.

15 MS. KLETTER: Yeah, I don't think there are any other
16 documents related to it.

17 THE COURT: And there haven't been any W-2s or
18 paystubs or anything like that that exist that need to be
19 produced?

20 MS. KALMANSON: We are not in possession of any of
21 those at this time, and I don't think he's had W-2 employment.

22 And frankly, the irony here is that this is a case
23 about the defendants not properly recording employees' wages,
24 paying partially in cash, not paying taxes on wages properly.
25 The defendants are trying to cloak plaintiff with its own

1 misconduct.

2 THE COURT: Okay. So then at this point you're
3 saying, if I understand correctly, Ms. Kalmanson, Ms. Kletter,
4 Ms. Cohen, the whole argument that Mr. Moser is relying on to
5 get the tax returns, which is the existence of his own
6 business, you're saying, is a fabrication. There is no other
7 business; am I right about that?

8 MS. KALMANSON: It's a manipulation. He works odd
9 jobs, yes.

10 MS. KLETTER: He works odd jobs and the fact is what
11 we are representing is that we've provided all the information
12 about the money that he has made. Mr. Moser is entitled to
13 depose our client. It's improper for him to get tax returns at
14 this juncture. It's beyond --

15 THE COURT: Okay.

16 MS. KALMANSON: It's beyond what is necessary.

17 THE COURT: Okay. So here's what I would say, at
18 this point --

19 MR. MOSER: Your Honor, may I be heard?

20 THE COURT: You can say what you need to, Mr. Moser,
21 but then we're going to move on.

22 Go ahead.

23 MR. MOSER: Understood.

24 So whether he's earning -- whether he's -- he
25 provided to us an invoice from Galvan Landscaping which shows

1 that he was paid money for a side job. The plaintiffs are
2 admitting that he performs odd jobs and earns income from them.
3 That is income and we rely on him to tell us what his income
4 was from these odd jobs. It's simply not a case where a W-2 at
5 the end of the year makes it clear what this man is actually
6 earning.

7 So for that reason we, again, we -- he's the one
8 who's put this at issue by alleging future lost earnings, not
9 the defendants.

10 THE COURT: So for the plaintiff, Ms. Kalmanson, is
11 there an interrogatory response that you provided to the
12 defendant that lays out the detail of Mr. Galvan's income after
13 he's terminated --

14 MS. KALMANSON: Yes, your Honor.

15 THE COURT: -- to the extent you (indiscernible) able
16 to pull it together?

17 MS. KALMANSON: Yes.

18 THE COURT: Okay.

19 MS. KALMANSON: Yes. We've already provided that.
20 He is entitled to depose our client as to it, and those
21 requests for tax returns is premature. If after the deposition
22 this is something that defendant believes he needs, we can
23 revisit it then, but it's premature at this point. I mean,
24 that's the case law we provided.

25 THE COURT: Well, I think the case law says that, in

1 general, the burden for Mr. Moser to obtain tax returns is
2 slightly higher. You have to show not just that they're
3 relevant but there's a compelling need for them and that the
4 information cannot be obtained through other less intrusive
5 means. So I think that definitely is the case law.

6 So I guess what I would say at this point is for now,
7 I would agree with the plaintiff that tax returns aren't
8 absolutely necessary. It's not clear to me that there aren't
9 alternative documents or means to obtain the information less
10 intrusively, but this is without prejudice for Mr. Moser to
11 request these documents at a later time after the plaintiff is
12 deposed or after further discovery and so we'll leave it at
13 that for now.

14 MR. MOSER: Thank you, your Honor.

15 THE COURT: So in terms of the unemployment insurance
16 file, it seems like that issue has been resolved.

17 Am I right about that, Mr. Moser?

18 MR. MOSER: Correct.

19 THE COURT: Okay. So that's off the table.

20 What about medical records regarding the disability?
21 Are those still in dispute?

22 MS. KALMANSON: We produced medical records, your
23 Honor.

24 THE COURT: Okay.

25 Mr. Moser, you agree? Is that off the table?

1 MR. MOSER: He has produced some -- some discharge
2 papers. That's the only thing that he's produced. However,
3 they have furnished a single medical authorization, to the
4 extent that he only sought that medical provider, I think we
5 can just obtain those directly from the source.

6 MS. KALMANSON: Yeah, we've provided HIPAA forms, one
7 HIPAA form.

8 THE COURT: Okay. So for now that's off the table.

9 There's workers' compensation file, is that still in
10 dispute?

11 MR. MOSER: From the defendants' perspective, yes.
12 To the extent that the authorization comes back and says, hey,
13 there's no file, we don't have a file for him, we're okay with
14 that. We would just want the authorization.

15 THE COURT: Ms. Kalmanson, what is your position on
16 that?

17 MS. KALMANSON: He didn't apply for workers'
18 compensation. I don't know why we have to provide
19 authorizations for that.

20 THE COURT: Okay.

21 MS. KALMANSON: And they know he didn't apply because
22 they're the employer.

23 THE COURT: Okay. So then can you just confirm --
24 have you confirmed before this call that he didn't -- that
25 there is no reason for that authorization because he never

1 applied for workers' compensation? Is this something --

2 MS. KALMANSON: I believe we have put that in
3 writing, but to not belabor the point, I will put it in a
4 letter that I am sending again.

5 THE COURT: Okay. Perfect.

6 So from my perspective that's a resolved issue.

7 So that leaves us with cellphone records and a couple
8 of other things.

9 Cellphone records. So Mr. Moser, explain to me why
10 you need cellphone records. What do you hope to gain from that
11 information?

12 MR. MOSER: Yes. The plaintiff had a company-issued
13 cellphone for 20 years. And then shortly before his
14 termination, but after he claims the discrimination began, he
15 lost his company-issued phone. So that's gone and all the
16 communications on that are gone, but mysteriously, he
17 volunteered to pay for his own phone, and he is claiming that
18 he took a lot of actions to mitigate his damages. We believe
19 that -- we're seeking those -- we're not looking for all of his
20 cellphone records, we're just looking for a call detail report
21 for a brief period of time in order to establish whether or not
22 he was using that cellphone to seek alternate employment.
23 That's all we're looking for.

24 THE COURT: Okay. And you think by getting those
25 records -- what are you going to learn? You're going to see a

1 list of phone numbers, then what are you going to do?

2 MR. MOSER: Well, we'll be able to use that at his
3 deposition to determine, you know, whether or not he was
4 actually making calls and who these calls were to. That's all
5 we're looking for. We're not looking for -- again, we have the
6 burden of proving that he didn't mitigate damages. Not him.
7 So that's why we're looking for those records, especially
8 because of the loss of the cellphone just before he leaves.
9 Ordinarily, we would have some of that information but we
10 don't.

11 MS. KALMANSON: Your Honor, this is --

12 THE COURT: Go ahead.

13 MS. KLETTER: This is a sideshow. The cellphone
14 records for the purported use Mr. Moser is representing that he
15 would like them for all (indiscernible) in service of
16 theoretically trying to challenge his efforts at mitigation.
17 This is a damages question. We can have an inquest on damages
18 after we easily establish the liability at issue here.

19 This is a sideshow. Defendants have barely produced
20 anything and we are in the weeds in minutia of the legal
21 documents that we're trying to withhold for privacy. He wants
22 a call log to see who this guy is talking to? That's really
23 beyond the pale, particularly when he hasn't even been deposed
24 yet.

25 THE COURT: Well, can you address the point he is

1 making, which is that he thinks somehow that looking at his
2 records he'll be able to identify whether he's been making
3 phone calls in that short term time period to find alternative
4 work?

5 Do you disagree? What is your response to that?

6 MS. KLETTER: I do disagree. And let's just take
7 this in a hypothetical. Let's say there's ten phone calls in a
8 week; his daughter, his brother, a pharmacy, a supermarket. I
9 have no idea who this guy has talked to, right?

10 He's going to see a phone record for the pharmacy.
11 Now, Mr. Galvan is going to have to answer whether he was
12 calling about a prescription or to see if they needed a clerk
13 for the front register? This is what he wants to spend his
14 hours deposing him on? I'm sure it's not. This is all a
15 tactic to invade his privacy and drive up costs to try to be a
16 bully.

17 THE COURT: Okay. And what about travel records?
18 Explain to me, Mr. Moser, what travel records are you actually
19 seeking and why.

20 MR. MOSER: Yeah. So just about the time that
21 Mr. Galvan lost his company cellphone, he also obtained a
22 brand-new passport. And the brand-new passport has very little
23 information in it. Of course it only has information following
24 September of 2022. And he -- just to clarify, Mr. Galvan was
25 paid every single week a salary, regardless of whether he

1 showed up to work. And he's claiming that he worked every
2 single week. My client is saying, no, this is not the case.
3 He did not work every single week. He was in Mexico sometimes
4 for a month at a time or three weeks at a time and he traveled
5 extensively.

6 Mr. Galvan -- we're just asking for his travel
7 records so that -- because, again, my client, unfortunately,
8 unfortunately, we did not, we did not keep many records about
9 his travel.

10 MS. KALMANSON: Your Honor --

11 THE COURT: Go ahead, please.

12 MS. KLETTER: Kim, let him finish.

13 MR. MOSER: Yeah.

14 And, you know, the idea that we're somehow being a
15 bully here, I just want to put this in perspective. We have a
16 man who's claiming \$2 million in damages from a family-owned
17 landscaping company. I disagree with regard to who the bully
18 is here. And you know -- that's all I have on that issue.

19 THE COURT: But explain to me what travel records?
20 What does that even mean? What are the travel records you're
21 looking for?

22 MR. MOSER: So with his authorization, we can -- with
23 modern technology, we can get his travel records from the FAA.

24 MS. KLETTER: But, your Honor, it doesn't matter if
25 he was traveling. It's completely irrelevant.

1 THE COURT: Let us do one at a time because by phone,
2 it's hard for me to hear you both at the same time.

3 So Mr. Moser, why don't you finish -- (indiscernible)
4 get his record, that's assuming if he's traveling by plane.

5 MR. MOSER: You know he always traveled by plane. He
6 always traveled by plane.

7 THE COURT: Okay. So that's what you're seeking.
8 You want to get records over what period of time?

9 MR. MOSER: For the time period that he's claiming
10 that he worked overtime, and that would be from 2019 to 2023,
11 the end of his employment.

12 THE COURT: Okay.

13 MS. KLETTER: Your Honor (indiscernible).

14 THE COURT: Let me just finish with Mr. Moser to see
15 if I have any questions before you respond.

16 So you have -- if you get these record, what you're
17 hoping is you'll see when he has traveled over certain periods
18 of time. So how will that work with the argument about
19 overtime? Meaning, you think that you'll be able to track the
20 time that he was traveling and say that he's claiming overtime
21 for periods that he was not working?

22 MR. MOSER: Absolutely. And if we had -- what we
23 understand is the following. We have punch records for a
24 certain period of time, but there are big holes in those punch
25 records. He's going to say he worked but didn't punch in. And

1 so -- and that's my understanding based upon what was
2 represented that he worked 60 hours every single week. So
3 we're just looking for information regarding his travel.

4 THE COURT: Okay. And is there any other means to
5 obtain information about whether or not he was actually working
6 during these OT periods or not? Aside from looking at the
7 travel records, have you explored other options?

8 MR. MOSER: I discussed this with my client. There's
9 nothing else that would be as succinct or which would be as
10 comprehensive as simply obtaining his FAA travel records.

11 THE COURT: Do you have -- I mean, during the period
12 that he had overtime, do you have information or records about
13 which client he worked for or not?

14 MR. MOSER: So could you repeat the question, your
15 Honor?

16 THE COURT: Sure. You have his claim for overtime
17 for certain periods of time.

18 MR. MOSER: Yes.

19 THE COURT: Do you have records internally that let
20 you know where he should have been working during those
21 periods?

22 MR. MOSER: Hmm. Not always, your Honor. I'll
23 consult with my client about that. I see what the Court is
24 suggesting and let me speak with them about that. I don't
25 believe -- again, this is a father/son operation.

1 THE COURT: Right. I get it. I get it. It's a
2 small operation.

3 MR. MOSER: Yes.

4 THE COURT: But I guess I'm just trying to understand
5 why this is the most efficient or effective way to get at what
6 you're trying to get at. So I'm just trying to understand what
7 you are --

8 MR. MOSER: Well --

9 THE COURT: Go ahead and then I'll ask Ms. Kalmanson
10 and others to respond.

11 MR. MOSER: Simply because -- it is not intrusive.
12 All we have is his travel records. We can see when he was on a
13 plane and when he came back. It's actually reliable and,
14 again, it's nonintrusive. We're just asking for when he was
15 here and when he wasn't here; nothing more, nothing less.

16 THE COURT: Okay. So let me ask the plaintiffs to
17 respond. Plaintiff to respond.

18 MS. KALMANSON: Yes. Thank you, your Honor.

19 We have disclosed to Mr. Moser in a five-year period
20 when Mr. Galvan acknowledges that he was not at work for
21 vacations or illness or otherwise.

22 We maintain that it is the employer's burden,
23 recordkeeping burden, whether they are a mom-and-pop business,
24 a set of working parents who have a nanny, or whether they're
25 Walt Disney Company, they have a recordkeeping burden to keep

1 track of when employees are at work, what hours they are paid,
 2 and how their pay is calculated. This is an end run around
 3 their own failure to comply with their recordkeeping
 4 obligations.

5 Had Mr. Galvan requested booking confirmations for
 6 travel or hotel reservations for travel or any other narrowly
 7 tailored means to show that he wasn't at work at times that
 8 he's represented that he's at work, we would consider that.
 9 But he asked for, I don't remember the exact number, multiple
 10 versions of ways to get Homeland Security records. That's not
 11 proper.

12 THE COURT: Okay. And then last, I think the last
 13 thing on my list, I just want to tick these off, is retainer
 14 agreements.

15 So Mr. Moser, explain to me why you need that.

16 MR. MOSER: At this point we're withdrawing that
 17 claim. We're not going to pursue the retainer agreements.

18 THE COURT: Okay. So then is there anything else
 19 that you're seeking that I haven't asked you about so far?

20 So we have the cellphone records and travel records
 21 still remaining. Is there anything else that I missed?

22 MR. MOSER: Let me just take a look very quickly,
 23 your Honor, because there's so much going on here.

24 I believe that's it.

25 THE COURT: Okay. So based on what I've heard, to me

1 it sounds like the potential relevance of the cellphone records
2 and travel records is tenuous at best, and that there are other
3 less intrusive means, I think, that you can get at the same
4 kind of information. It doesn't strike me that going to
5 Homeland Security for travel records is the most effective or
6 most efficient way to get at the evidence that you're looking
7 for and I do think that it's more intrusive than it needs to
8 be.

9 Similarly with the cellphone record, at the end of
10 the day, I just don't see how that's going to advance the ball
11 as much as you think, and it is more intrusive than necessary.

12 So for now I'm going to deny those requests. You
13 can -- if for some reason after further discovery and attempts
14 to get at the same information in less intrusive ways you are
15 unable to and you have a good faith basis for still needing
16 those records, then you can ask it. You can come back and we
17 can talk about it again. But for now, I don't see how they're
18 necessary at this point.

19 I think that covers the issues that --

20 MR. MOSER: Clarification, your Honor -- sorry.

21 THE COURT: Go ahead. Clarification.

22 MR. MOSER: Yeah, those requests are being -- the
23 motion to compel is being denied without prejudice.

24 THE COURT: Yes.

25 MR. MOSER: Okay. Thank you.

1 THE COURT: So I guess that -- were there other
2 issues on the plaintiff's side? You brought a couple of issues
3 up in the letter. Did you want to address those?

4 MS. KALMANSON: Your Honor, yes --

5 MS. COHEN: Yes, your Honor.

6 MS. KALMANSON: Go ahead, Randi. You --

7 MS. COHEN: No, no, no, you go, Kim. You're closer
8 to this than I am.

9 MS. KALMANSON: So we've been through Mr. -- through
10 defendants' production and we do not believe that they have
11 done a fulsome search of ESI. Mr. Moser was going to check on
12 that. We had a meet and confer on July 25th. He said he'd get
13 back to us July 31. He didn't. And then earlier this week he
14 was going to get back to us and he stated that he was tied up
15 with a brief.

16 We need to advance the ball on this. We haven't
17 formally moved to compel at this point, but we need the
18 documentation to move forward. We will -- if forced to move to
19 compel, we will do so, but I bring it up on the call to try to
20 avoid that.

21 THE COURT: Okay. So tell me a bit more about,
22 Mr. Moser, where do things stand on ESI? Have you looked into
23 it? What's your position?

24 MR. MOSER: So again, this is a -- this is a -- this
25 is a small landscaping company. It's my understanding that

1 Mr. Galvan is claiming that my clients texted with each other
 2 concerning him and that he believes that those text messages
 3 are relevant. We -- just for clarification, we haven't seen
 4 any text messages from Mr. Galvan's phone that concern his
 5 employment or communications with any of our clients.

6 And I did mention to plaintiff's counsel that I would
 7 look into this. Unfortunately, though, I've been spending my
 8 time drafting motions and doing other things, but we're willing
 9 to -- we're willing to work in good faith to try and attempt --
 10 to attempt to resolve this.

11 THE COURT: Okay. So then the question is really
 12 timing. Can we set a timeline for the two of you to -- for
 13 Mr. Moser to look into the ESI issue and get back to the
 14 plaintiff so that we can move the ball forward on that?

15 How long will it take you, Mr. Moser, now that these
 16 issues will get resolved that you've been writing letter
 17 motions about to get to the bottom of the ESI question?

18 MR. MOSER: I would like Friday, but I think Monday
 19 would be better. I think --

20 THE COURT: Okay. Monday, the 19th?

21 MR. MOSER: If we could have a week, that way I'm not
 22 up against any deadlines and I have enough time to speak to my
 23 client in detail.

24 MS. KALMANSON: Your Honor --

25 MS. KLETTER: Your Honor --

1 MS. KALMANSON: We don't object to the week, but we
2 will need more time for discovery, if that's the case.

3 But that being said, what I'm hoping that we can do
4 is have deliverables, right? What searches were performed?
5 What search terms were used? How were they performed? Who
6 performed them? So that we're not in a week back at, yeah,
7 they searched ESI, there's nothing there, right?

8 It is inconceivable to me that there's not a single
9 piece of ESI. The defendants have an affirmative duty to
10 search ESI. We are now more than a month past the discovery,
11 the production deadline. We're more than a month past our
12 deficiency notice.

13 MS. KLETTER: And this is the third representation,
14 this is the third representation from defendant that they'll
15 talk to their clients and get back to us.

16 So, you know, we've already seen a demonstration that
17 there's not a good faith effort to work this out, and we will
18 be seeking costs if we have to bring this back to the Court's
19 attention. This isn't a matter of my client searched their
20 text messages. This isn't a matter of my clients searched
21 their text messages on their own and I trusted them with what
22 they told me. Defendants have an affirmative obligation for
23 the attorney or a vendor to oversee the searches, the
24 parameters that were put in place, and to report back how those
25 searches were run.

1 THE COURT: Okay. So Mr. Moser, when you go back to
2 do your search, what were you planning to do?

3 MR. MOSER: I was planning on discussing this with my
4 clients to see if ESI actually exists. You know, the idea --
5 we're talking about a small company here. If they're willing
6 to pay for -- they would be the ones to have to pay for it
7 anyway. I mean, we're not -- the defendant -- the
8 plaintiffs -- excuse me. The plaintiff has not searched for
9 any ESI. We have no reports of any searches for ESI on the
10 plaintiff's end. If we're going to do this, then it should be
11 a mutual disclosure.

12 MS. KALMANSON: But how can you make a representation
13 about the searches that we've conducted, your Honor, and
14 Mr. Moser, which you've never asked?

15 THE COURT: So this --

16 MS. KALMANSON: (Indiscernible).

17 MR. MOSER: Listen.

18 THE COURT: We're talking about ESI relating to what,
19 phone, text messages, or something else?

20 MS. KALMANSON: Text messages and emails.

21 MR. MOSER: If they want to do this, your Honor, I
22 have no issue with that. But we want Galvan's cellphone as
23 well if they're going to be looking into this. Again, the
24 Court already said that a simple list of phone calls is
25 intrusive.

1 THE COURT: Mr. Moser (indiscernible).

2 MS. KALMANSON: But the (indiscernible).

3 Sorry, sorry.

4 MS. KLETTER: Mr. Moser, we provided you with certain
5 text messages and we are not withholding anything. And he's
6 looked through his texts. We know --

7 MR. MOSER: Okay, so (indiscernible).

8 MS. KLETTER: We know that David and Evan Ferraro
9 texted with each other on a daily basis, and in our document
10 requests you said that you didn't have documents for over half
11 of the documents that we made requests about, including
12 policies, overtime compensation, payments, you know, and all of
13 these things, and it's incredulous to us that these two people
14 who are the defendants in this case don't have any text
15 messages or emails relating to these matters. And it's your
16 affirmative obligation to go and oversee it.

17 THE COURT: Okay. So let's take it down a notch and
18 let me just say this.

19 Let's put aside the question of vendors and all of
20 that. The first step is for Mr. Moser to go back to his
21 clients and do a complete check about what type of emails they
22 may have or documents, electronic documents they have relating
23 to this case that are responsive, as well as text messages.
24 That would be their first step; identify the universe of what
25 may be out there and what may be responsive.

1 And then we can talk about a mutual way in which both
2 sides are conducting searches to produce them. I don't know
3 if, for example, the plaintiff, as part of your production of
4 text messages, you used a vendor or whatnot, or how you went
5 about doing it. But it seems to me it makes sense that it
6 would be a mutual effort on both sides to locate responsive
7 documents, if they exist.

8 So Mr. Moser, go back to your client. Do some
9 analysis to figure out what, if anything, exists and meet and
10 confer -- get back to the plaintiff within a week's time, which
11 is Wednesday, August 21, with information about what you've
12 learned and how you propose to go about producing it, if it
13 exists.

14 MR. MOSER: We will.

15 THE COURT: Okay. The parties, I guess -- well,
16 we'll take one thing at a time.

17 So that's the ESI issue, which I'll expect the
18 parties to be meeting and conferring about after Mr. Moser
19 responds by Wednesday, August 21, with that information.

20 What else, from the plaintiff's perspective, needs to
21 be addressed? Anything else left on your side?

22 MS. KALMANSON: The ESI is the primary issue, your
23 Honor.

24 THE COURT: Okay.

25 MS. KALMANSON: If Mr. Moser represents that all the

1 paper files were searched, then he's an officer of the Court.
2 We would have no way of knowing if paper files weren't
3 produced, or if the documents that defendants say don't exist,
4 actually don't exist. We're taking his representation for
5 that. It is -- the ESI is the primary issue.

6 THE COURT: Okay. And just for the record, that's
7 how it is in every case. I mean, parties review and look for
8 documents, and they confirm whether or not they exist and
9 that's usually how it works.

10 So let me ask you then, is the only other thing
11 outstanding then the motion to quash or are there any other
12 discovery disputes that the parties have at this point?

13 MR. MOSER: Your Honor, I hate to bring it up, but
14 since you asked, the interrogatory responses we gave
15 multiple -- they just, frankly, haven't been responded to
16 completely.

17 Like, for instance, Mr. Galvan said that he's
18 provided information about all of his income. He says that
19 he's been earning \$200 a week from a company, but he doesn't
20 say how much his total earnings have been since he was
21 terminated. And they've just -- although Judge Seibel's order
22 specifically permits fact interrogatories, they have refused to
23 answer ten fact interrogatories.

24 THE COURT: Okay. So does this relate back to the
25 issue we started with the tax returns? So what his earnings

1 have been since he was terminated?

2 MR. MOSER: These are -- these are numerous -- these
3 are interrogatories regarding mitigation of damages, lost
4 wages, again, which the defendants and the plaintiffs agreed
5 would be produced in the order that was submitted to Judge
6 Seibel and then signed by Judge Seibel.

7 THE COURT: Right. So as I understood it, the
8 plaintiffs were saying that they had provided that information
9 in their interrogatory responses. Is what you're raising that
10 you think those are still insufficient because they don't
11 provide enough detailed information?

12 MR. MOSER: Correct. Correct. And that's with
13 regard to several of the interrogatories.

14 Interrogatory number 3, 5, 14, they ask for details,
15 and interrogatory number 2, which are simply not provided, and
16 then there is a flat objection to ten fact interrogatories.

17 THE COURT: Okay. So I can't get into those, which I
18 don't have in front of me what those interrogatories are that
19 you're referring to, but I guess what I'll ask, to the extent
20 we're talking about interrogatories that required or has
21 information about Mr. Galvan's earnings or lost income, I'll
22 ask the plaintiff to respond to that.

23 I think you started by telling me when we were
24 arguing about tax returns that you provided all that
25 information in your interrogatory responses.

1 MS. KALMANSON: Yes.

2 THE COURT: That appears to be what Mr. Moser is now
3 saying might be deficient. What do you say to that?

4 MS. KLETTER: That's correct, Judge. It was provided
5 in the interrogatory response, and then there's other
6 interrogatories that -- where he states -- he has a question
7 like state all the facts that support your belief that
8 defendants illegally discriminated you. Now, that is something
9 that's outlined in the complaint and we did supplement our
10 interrogatories to provide more information, but there are
11 certain interrogatory requests that he made that are still
12 objectionable because he's asking for all facts. And as we've
13 stated, it's outlined in the complaint and it's also something
14 you can ask about at deposition.

15 THE COURT: Okay. So I think that in general I tend
16 to agree that it will be more efficient for that type of
17 information to be obtained through further deposition.

18 MR. MOSER: Your Honor, if I could be heard on this.

19 MS. KALMANSON: But to the extent that there's --
20 when it comes to the --

21 THE COURT: The income issue, or the earnings, I
22 think that was something we started with. So I think that's
23 something that's still worth addressing, because I had denied
24 the request for tax returns with the understanding that
25 information provided by the plaintiff was sufficient at this

1 point and that plaintiff would be deposed.

2 What I think what Mr. Moser's arguing is whether
3 information provided on that front is sufficient.

4 Is that what you're saying, Mr. Moser?

5 MR. MOSER: Precisely. And with regard to the fact
6 interrogatories, again, this is something that -- if he's not
7 willing to state all the facts, state the material facts.

8 What we don't want is the ground to start shifting.
9 I think if he shows up at a deposition and he can
10 comprehensively answer most of these interrogatories, then I
11 think we're fine. But what happens when we get to the
12 deposition and we ask him for a list of all dates in which he
13 traveled? And --

14 MS. KLETTER: Right. I think the Judge already ruled
15 on that, that you could then come back, you could come back and
16 get the records.

17 MR. MOSER: And he can't provide that --

18 THE COURT: Right.

19 MR. MOSER: What happens when -- what happens when we
20 get to the deposition and we ask him for a list of every single
21 person who he did a side job for and he doesn't have that?
22 These are all interrogatories that require research. To the
23 extent that he can answer these honestly at his deposition and
24 counsel is willing to represent that he can answer these
25 interrogatories at a deposition, I have no issues with that.

1 But these are not the types of interrogatories that a plaintiff
2 will simply know off of the top of his head.

3 MS. KALMANSON: To the extent they're (indiscernible)
4 interrogatories --

5 THE COURT: So these are contention interrogatories
6 that under Judge Seibel's rules, are allowed, is that what --
7 so I understand what we're dealing with.

8 MS. KALMANSON: Your Honor, contention
9 interrogatories are -- Rule 33.3 doesn't apply pursuant to
10 Judge Seibel's order; however, the interrogatories that we have
11 objected to are interrogatories that are broad contention
12 interrogatories, state all facts that lead you to believe that
13 plaintiff was discriminated against.

14 When we're talking about the dates he traveled, when
15 we're talking about the amounts he learned, we answered those
16 interrogatories. If Mr. Moser is unhappy with our answers, it
17 doesn't mean that they're false. And he has an opportunity to
18 depose our client. If we have to revisit this after the fact,
19 we can, but it is not our burden to restate every single
20 allegation in the complaint in an interrogatory, to state all
21 facts that lead us to believe he was discriminated against.
22 They're already in the complaint. He will speak to them in his
23 deposition. That is a different issue than what dates did you
24 travel on. Yes, he will testify truthfully. Will he remember
25 every single date he traveled in the last five years? I'm sure

1 he will not. Because I wouldn't. Right? But those are listed
2 in the interrogatories.

3 If there is an inconsistency that comes up in the
4 deposition that Mr. Moser wants to inquire about further, then
5 we can revisit this conversation. But this is all much ado
6 about nothing. We answered --

7 MS. KLETTER: Also --

8 MS. KALMANSON: -- in the prior answer.

9 MS. KLETTER: Yeah. It's also a very straightforward
10 case. There's not going to be any surprise, gotcha, Mr. Moser.
11 We have nothing to hide here. So it's not as if we're trying
12 to like hide secrets.

13 THE COURT: So I think for now what I will say,
14 Mr. -- so here's what I'm going to say. We are going to -- I
15 think -- I need -- I haven't allotted the whole afternoon,
16 unfortunately, to resolve all the issues today, but here's what
17 I would say.

18 At this point, Mr. Moser, I think it's premature to
19 really argue or raise issues about the completeness of that
20 interrogatory request. I think you have the facts you need to
21 move forward.

22 The plaintiff will be prepared at his deposition to
23 answer what he can using the interrogatory responses that
24 you've been given. To the extent you think that it's
25 incomplete or there's more information that needs to be

1 obtained, then there will be time in discovery to obtain it.
2 If you think it's based on some misdeed of the plaintiff in
3 responding to discovery, you can raise it with the Court at
4 that time. But at this point, I don't think there's
5 anything -- it's premature for us to argue about this. I think
6 you have what you need to move forward. But I understand your
7 concern and you can always raise it at a later time if you
8 don't get the information you need.

9 Let's move on just briefly to the (indiscernible), I
10 think that's the only thing remaining. That at least is ripe
11 in my mind.

12 Unless, plaintiff, is there anything else that I
13 didn't address in the letter you raised?

14 MS. KALMANSON: No, your Honor.

15 THE COURT: Okay. And Mr. Moser, there's nothing
16 else from your letters. I'm not inviting you now to raise new
17 issues that haven't been addressed in the letters. Is there
18 anything in your letters that I haven't addressed?

19 MR. MOSER: No.

20 THE COURT: So motion to quash. As I understand it,
21 these are nonparty customers that it sounds like the plaintiffs
22 have already served those subpoenas; am I correct?

23 MS. KALMANSON: That is correct, your Honor.

24 Defendants --

25 THE COURT: Okay.

1 MS. KALMANSON: Defendants did move to stay service,
2 which was denied by the Court.

3 THE COURT: Okay. And so at this point where things
4 stand is that you had said at the outset of this call or near
5 the outset that you were seeking documents in the first
6 instance from these customers and that you may or may not need
7 depositions down the road. Am I right about that?

8 MS. KALMANSON: So they are both -- the subpoenas
9 seek both documents and depositions. The form of the subpoena,
10 as your Honor knows, calls for the documents to be produced at
11 the deposition. It is our intent, though we have not yet done
12 so, we were waiting for this call, to reach out to the
13 nonparties and explain to them that we would ask for the
14 documents first, we can adjourn the depositions, and we may not
15 need the depositions if the documents demonstrate what we need,
16 or provide the information we're looking for, is what I mean.

17 THE COURT: Okay. And so based on my -- and so
18 Mr. Moser, your primary complaint about the subpoenas is that
19 you think that they're burdensome, harassing, they are
20 intrusive. Is there more -- do you argue that they're not
21 relevant or is it largely that you think you don't want to
22 hassle customers and have to be hauled in for depositions?

23 MR. MOSER: I would like to rely on the -- I would
24 like a formal decision on the motion to quash. It's been fully
25 briefed.

1 We -- here's the thing. The plaintiffs -- the
2 plaintiff, has stated several times that the only people who
3 have discoverable information are eight current and former
4 employees. And the idea that -- this is the reverse scenario
5 of when a defendant in an overtime case or in a discrimination
6 case attempts to subpoena a current employer of the plaintiff,
7 simply the hat is on the other side this time. We made
8 extensive arguments in our motion that we'd like to rely on
9 them. To the extent that this can be converted to a document
10 subpoena, I have no issue with that.

11 THE COURT: Okay. So the way I had been -- I'd like
12 to (indiscernible) a ruling on that so that the parties can
13 move forward and not wait for a formal written decision. If
14 you want that, we can still issue one, but I want the parties
15 to be able to move forward. In my view, what I was going to
16 happen is the parties -- that the subpoenas at this point
17 be converted into document subpoenas, that you first seek the
18 documents and see if you can work out an arrangement so that
19 the documents are sufficient for your purposes, and then come
20 back if you think you need the deposition.

21 My hope is that -- to me, the right thing to do would
22 be to first see if you have any billing documents that satisfy
23 this request. It seems potentially unnecessary to seek out
24 deposition testimony of these customers and potentially
25 burdensome, potentially intrusive.

1 So I think first step is get the documents and see if
2 that will resolve the issue short of needing a deposition. And
3 in deposition, if you're unable to work out with these
4 nonparties and/or Mr. Moser the production of these documents
5 to satisfy your inquiry, then come back to the Court and we can
6 talk it out whether the depositions make sense.

7 MS. KALMANSON: Your Honor, that's understandable and
8 understood.

9 I have a question about how you'd like to see that
10 proceed, right? So let's just say in theory these customers
11 have invoices reflecting that they paid Rolling Lawns for work
12 on X, Y, Z dates over one, two, three periods, right? But the
13 invoices aren't necessarily going to reflect who from Rolling
14 Lawns performs those services. So we're going to have to
15 questions. Right?

16 Now, Mr. Galvan was a 30-year employee. Could be
17 that he had a week-to-week relationship with some of these
18 people, I don't know. In the event that we get that kind of
19 information that opens the door to wanting additional
20 information in the form of a deposition, how would you like
21 that to be addressed to the Court, anticipating that we're not
22 going to be able to find common ground with Mr. Moser given the
23 history here?

24 THE COURT: So you, at the moment, intend to contact
25 these individuals, right? These nonparties, as far as you

1 know, don't have lawyers?

2 MS. KLETTER: Your Honor.

3 MS. KALMANSON: We know --

4 THE COURT: Go ahead, Kim.

5 MS. KALMANSON: One individual reached out to
6 Ms. Cohen, I believe, and indicated that he will be away on the
7 date of the deposition. There were no -- and that he didn't
8 have any documents. We haven't had any further conversations
9 with him. So our intent was to reach out to them. We don't
10 believe they are represented by counsel. We have no reason to
11 believe they're represented by counsel at this point, but of
12 course if counsel comes in, we'll deal with counsel. No one
13 has otherwise reached out to us. It was our intent to reach
14 out and seek the documents first.

15 I guess the question I have for the Court is, are we
16 re-serving subpoenas or are we just sort of doing this the way
17 proposed, which is to say please produce the documents first --

18 THE COURT: Yes.

19 MS. KALMANSON: -- and then we'll adjourn the
20 deposition --

21 THE COURT: The latter. The latter.

22 MS. KALMANSON: Okay.

23 THE COURT: The latter.

24 MS. KALMANSON: Okay.

25 THE COURT: I don't intend for you to re-serve. I'm

1 simply saying based on what you served -- what you can do with
2 these parties is say, we will adjourn the deposition requests
3 based on your production of documents instead, if you have any
4 that are responsive. And then to the extent you have follow-up
5 questions -- first see what you get. If you have follow-up
6 questions, you can ask them without a deposition to see if they
7 have answers.

8 And I think we can then address it when you have more
9 information to know what it is that they know and what you're
10 likely to get in terms of information from them. It may be
11 that a deposition is the easiest and most efficient, I don't
12 know. At this point, though, it doesn't sound like it to me
13 and I'd like you to first explore other options short of a
14 deposition.

15 Perhaps a written interrogatory. Maybe they can
16 respond to questions, interrogatories, that are directed at
17 particular invoices based on conversations you've had so that
18 they become admissible as evidence in the case.

19 Then there are probably other alternatives short of
20 having four to six positions of nonparty customers. So let's
21 explore them before we get there.

22 MS. KALMANSON: Understood, your Honor.

23 THE COURT: Okay. So at this point I think we have
24 some deadlines that we set and I will see if -- you all took
25 good notes, hopefully.

1 But the middle of next week, August 21, I know
2 Mr. Moser was going to follow up with an answer on the ESI
3 questions and the parties are going to meet and confer.

4 I also believe the plaintiff is going to send a
5 letter that clarified or confirms whether or not they withheld
6 any documents based on their objection, and whether any
7 documents have been withheld on the basis of privilege, and the
8 timing for production of a privilege log. I don't recall if I
9 set a deadline for that letter.

10 Do you have a view -- go ahead.

11 MS. KALMANSON: You did not, your Honor. The letter
12 is also to include a statement that Mr. Galvan did not apply
13 for workers' compensation, by my notes.

14 THE COURT: Okay. So then how long do you think
15 you'll want to be able to put that letter together and get over
16 to Mr. Moser?

17 MS. KALMANSON: We can get that letter together by
18 Friday.

19 THE COURT: Okay. Great.

20 So let me see if there's anything else. It would be
21 helpful to keep in close touch with all of you given all of the
22 moving parts and issues that seem to come up.

23 The issue of the deadline, you know, we can revisit
24 your fact discovery deadlines and the like. It sounds like
25 both parties are in agreement that we should work through these

1 document issues and make sure that everything is squared away
2 before you start taking all the depositions.

3 Is everybody still in agreement about that?

4 MR. MOSER: Yes, your Honor.

5 THE COURT: Okay. So I'd like the parties then to,
6 based on the ruling today, based on our discussion, talk
7 through what that looks like and propose sort of a new timeline
8 among yourselves for when you'd like to reschedule these
9 depositions in light of any other document that needs to be
10 produced.

11 And that would include, you know, thinking about
12 extension of deadline, realistically how much time do you think
13 you'll need to complete fact discovery and then expert
14 discovery after that. So let's have a conversation about that.

15 Let's see, in the first week of September, are people
16 around?

17 MR. MOSER: I am, unfortunately, your Honor.

18 THE COURT: You are unfortunately? Okay.

19 And on the plaintiff's side, is that a week -- are
20 you around that week?

21 MS. KALMANSON: Yes, your Honor.

22 THE COURT: Okay. So why don't we check in by status
23 conference like this one on Thursday, September 5th, at 11:00
24 a.m. Does that work for everyone?

25 MS. COHEN: Your Honor, with the caveat that the case

1 is 99 percent settled, Kim Kalmanson and I are already
2 scheduled to be before Judge Cote at 11:00 a.m. that day.
3 We're settling that case, but it is not papered so...

4 THE COURT: Okay. Let's see, how about is Wednesday
5 September 4th better? 11:00 a.m.

6 Does that work for you all?

7 MS. COHEN: Kim, Joni, is that okay for you?

8 MS. KALMANSON: That's fine for me.

9 MS. KLETTER: Yeah, yeah.

10 THE COURT: Okay. So why don't we say Wednesday,
11 September 4th at 11:00 a.m. We'll enter a minute entry that
12 sets that date for a status conference.

13 So by then I'll hope to learn more from the parties
14 about how you've done with ESI and your discussions about that
15 and your proposal for how to move forward with the depositions
16 schedule and potential revising of deadlines in light of the
17 document discovery that needs to be done.

18 And of course if there are any issues that need to be
19 addressed before that date, the parties should follow my
20 individual practices. So I know you have Judge Seibel's case
21 management plan with its way of how (indiscernible) to be
22 resolved. But to be clear, this case has now been referred to
23 me for general pretrial supervision. So my rules apply as to
24 how we're going to resolve discovery disputes going forward.

25 Under my rules, what I expect from the parties is

1 that you have to meaningfully meet and confer and reach an
2 impasse before you reach out to me by premotion letter, no
3 longer than three pages, explaining to me the nature of your
4 dispute and the steps you've taken to reach resolution. The
5 other side gets an opportunity to respond within five business
6 days and then we're going to have a call like this one to hash
7 it out with the hope of resolving things short of full-blown
8 motion practice.

9 I don't have deadlines like the ones in Judge
10 Seibel's rules that say X number of days after you serve a
11 response or objection and you have X number of days to make
12 objections or meet and confer or to (indiscernible). I don't
13 have anything like that. So those rules don't apply here.

14 Does anyone have any questions about that?

15 MS. KALMANSON: No, your Honor.

16 THE COURT: Okay. Let's see.

17 I think that's it for now. I'll adjourn and wish you
18 all a good day.

19 MR. MOSER: Your Honor.

20 THE COURT: Yes, go ahead. You have something more?

21 MS. KALMANSON: Please tell me it's not another
22 dispute, Mr. Moser.

23 MR. MOSER: No. I just want to clarify --

24 MS. KALMANSON: Okay. Good.

25 MR. MOSER: I just want to clarify that the motion to

1 quash is being held in -- the formal motion to quash is
2 basically being held in abeyance pending further information
3 from the nonparties.

4 THE COURT: Held in abeyance. I mean, I guess --

5 MR. MOSER: Otherwise, there is a motion that's fully
6 submitted to the Court, you know, I understand --

7 THE COURT: I mean, I've ruled on the record today on
8 that motion. I guess the question is formally will you call
9 it -- I think it is granted in part and denied in part, the way
10 I view it. I think I'm granting your motion to the extent that
11 I'm not allowing depositions to move forward at this time. I'm
12 denying your motion to the extent I'm allowing the documents
13 subpoena portion of it to move forward. The question of
14 depositions can be revisited at a later time by the plaintiff,
15 but at the moment that request was denied.

16 MR. MOSER: Okay. Thank you.

17 THE COURT: Okay. Okay. So with that I'll say
18 goodbye to all of you and look forward to hearing from you all
19 or talking to you all in early September, unless I hear from
20 you before then.

21 Thanks very much.

22 MR. MOSER: Thank you.

23 MS. KALMANSON: Thanks, your Honor.

24 THE COURT: Thank you.

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